

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1190

Original
with affidavit of service

Docket #77-1190

To be argued by
STEPHEN FLAMHAFT

THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

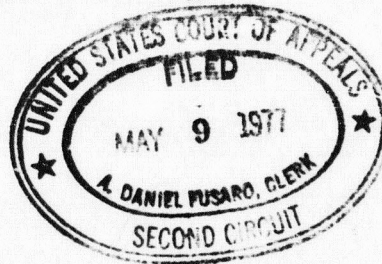
-----X
THE UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

FELIX C. ACEVEDO and RALPH MARIANI,

RALPH MARIANI-Defendant-Appellant.
:
:
:
:
:
-----X



APPENDIX TO APPELLANT'S BRIEF

STEPHEN FLAMHAFT
Attorney for Defendant
32 Court St.-Suite 802
Brooklyn, New York 11201

PAGINATION AS IN ORIGINAL COPY

1
2 UNITED STATES DISTRICT COURT
3 EASTERN DISTRICT OF NEW YORK

4 -----x
5 UNITED STATES OF AMERICA, :
6 -against- :
7 RALPH MARIANI, :
8 Defendant. :

75-CR-757

9 -----x
10
11 United States Courthouse
12 Brooklyn, New York

13 October 21, 1976
14 2:00 p.m.

15 B e f o r e :

16 HONORABLE THOMAS C. PLATT, U.S.D.J.
17
18
19
20
21
22

23 HENRI LEGENDRE
24 ACTING OFFICIAL COURT REPORTER
25

Appearances:

DAVID G. TRAGER, ESQ.
United States Attorney
for the Eastern District of New York

BY: C. SCHWARTZ, ESQ.
Assistant U.S. Attorney

STEPHEN FLAMHAFT, ESQ.
Attorney for Defendant

THE CLERK: United States of America versus
Ralph Mariani.

THE COURT: Are you ready?

MS. SCHWARTZ: The Government, as I understand it,
has the burden to show by a preponderance of evidence
that it was valid, ^{search} so I'll put on an agent who took the
consent to testify.

THE COURT: All right.

MS. SCHWARTZ: The Government calls Henry Garcia.

(At this point the witness was sworn by the Clerk
of the Court stating his name as Henry Garcia.)

DIRECT EXAMINATION

BY MS. SCHWARTZ:

Q Agent Garcia, are you a special agent with the
FBI?

A Yes, I am.

Q Were you on duty on August 25, 1975?

A Yes, I was.

Q ~~Where~~ were you at approximately 11:30 or 11:45 that
day?

A Approximately at that time I was about five or
six blocks away from Ralph Mariani's residence.

Q Were you in the vicinity of Argyle Road in Brook-
lyn, New York?

1

2

A Yes, I was.

3

Q And what were you doing in that location?

4

A I was stake^d out in a car, the car belonging to Ralph Mariani waiting to see if Mr. Mariani would come to his car with intentions of affecting an apprehension.

7

Q Did there come a time when you received a message to go to Ralph Mariani's apartment?

9

A Yes, there did; Special Agent Matthew J. Cronan advised me of -- over the radio -- that he had arrested Mariani.

11

Q At approximately what time, if you recall, did you receive that message?

13

A I don't recall exactly but I would say it was approximately shortly before midnight.

15

Q What did you do after you got the message?

16

A I went over to Mariani's apartment.

17

Q Did you proceed directly to the apartment?

18

A Yes, I did.

19

Q And is that apartment on East 19th Street in Brooklyn?

21

A Yes, it is.

22

Q Do you recall what time you arrived at the apartment?

24

A I don't know the exact time. It would have taken me approximately five minutes to get there.

25

1
2 Q Were arrest locations maintained by Special Agent
3 Cronin about the arrest in questioning of Ralph Mariani?

4 A Yes; Matthew Cronin maintained a log.

5 MS. SCHWARTZ: May I have this marked for
6 identification?

7 THE CLERK: Government's Exhibit 1, one page
8 document marked for identification.

9 Q I show you what has been marked as Government's
10 Exhibit 1 for Identification and ask if you recognize this?

11 A Yes, I do.

12 Q How do you recognize it?

13 A I have affixed my signature at the bottom of the
14 log and dated same.

15 Q Is this the log that was kept pertaining to the
16 arrest of Mr. Mariani?

17 A Yes, it is.

18 MS. SCHWARTZ:: Your Honor, I ask that this be
19 admitted into evidence.

20 MR. FLAMHAFT: No objection.

21 THE COURT: It may be admitted.

22 THE CLERK: Government's Exhibit 1, a log dated
23 8/25 to 8/26/75 marked in evidence.

24 Q By the way Agent Garcia, is it customary for FBI
25 agents to keep such logs? Are they kept in the regular course

1 of business?

2 A Yes, they are.

3 Q Could you please look at Exhibit 1 and tell us
4 if this refreshes your recollection as to what time you arrived
5 at Mr. Mariani's apartment?
6

7 A I am unable to say specifically at what time I
8 arrived. I would guess that it would have been at approximately
9 five minutes ^{after} Cronin affected the arrest, which would have been
10 11:50 P.M.

11 Q 11:50 is approximately the time you would have
12 arrived at the apartment?

13 A Approximately.

14 Q At what time was he placed under arrest, accord-
15 ing to the log?

16 A 11:45 P.M.

17 Q What did you do when you arrived at the apartment?

18 A I asked Agent Cronin if he had advised Mr. Mariani
19 of his rights; he indicated that he had.

20 Q And who was in the apartment at that time?

21 A At the apartment was Agent Cronin, two detectives
22 of the New York City Police Department and Mariani.

23 Q What did you do after Agent Cronin told you that
24 he had advised Mr. Mariani of his Miranda warnings.

25 I identified myself to Mariani; I advised him of

his rights orally in the Spanish language.

Q And did you tell him or explain to him why he was being arrested?

A Yes, I did.

THE COURT: Wait a minute. Does Mr. Mariani need an interpreter?

MR. FLAMHAFT: No sir, that is not the problem.

MS. SCHWARTZ: That issue was discussed at the original trial.

THE COURT: All right.

BY MS. SCHWARTZ:

Q What did you tell Mr. Mariani as to why he was being arrested?

A I don't remember the exact words that I used. I told him that he was being arrested in connection with the bank robbery that had occurred on that day at the Chase Manhattan Bank on Cortelyou Road.

Q Was it Chase Manhattan or Chemical Bank?

A I'm sorry, Chemical Bank.

Q What did you next say to the defendant and what did he say to You?

A He indicated that Cronin had advised him of that.

Q Did there come a time when you had a conversation with Mr. Mariani concerning his car?

1
2 A Yes. Agent Cronin advised me that we would want
3 to secure his permission -- that is Mariani's permission to
4 search his car.

5 Q And did you have a conversation with Mr. Mariani?
6 Or did you ask him for permission?

7 A Yes, I did.

8 Q What did you say to him and what did he say to
9 you as best you can recall?

10 A I indicated to him that we wanted to search his
11 car. He stated that he would grant us his permission. I
12 indicated that I would have to obtain a written permission from
13 him, and he indicated that we would find a gun and some ammuni-
14 tion in the car.

15 Q Now, did you tell him that he had the right to
16 refuse permission?

17 A I advised him that he had the right to refuse
18 permission for the search of his car.

19 Q What was his response to your request to seek
20 permission?

21 A He indicated that he would be willing to furnish
22 us with permission for the consent to search his car.

23 THE COURT: Mr. Garcia, you asked him for written
24 permission and then said he then said there was a gun;
25 and whatelse in the car?

THE WITNESS: Ammunition.

Q What did you do next?

A I obtained a piece of paper from Matthew Cronin and I proceeded to write out the permission, then I read it to him. When I read it to him, I showed him the statement that I had written out so he could read it as I was reading it to him and then I asked him if he would be willing to sign it and he did.

Q Did you first ascertain whether or not he could read and write English?

A Yes, I did.

MS. SCHWARTZ: May I have this marked as Government's Exhibit 2 for Identification?

THE CLERK: Government's Exhibit 2, a document front and back marked for identification.

Q I show you what has been marked as Government's Exhibit 2 for Identification and ask if you recognize this?

A Yes, this is the witness' permission that Mariani furnished us in connection with the search of his automobile.

Q And how do you recognize it?

A I have affixed my signature to the back of the piece of paper.

MS. SCHWARTZ: Your Honor, I ask that this be admitted in evidence as well. It's been previously

shown to defense counsel.

MR. FLAMHAFT: Objection. I would ask for a voir dire.

THE COURT: All right, you may have a voir dire.

VOIR DIRE EXAMINATION

BY MR. FLAMHAFT:

Q Officer, is this your handwriting?

A Yes, it is.

Q Mr. Mariani has not written one single word on this than signed his signature; is that correct?

A Yes.

Q You spoke to him in Spanish or English?

A In both.

Q In both?

A Yes; English and Spanish.

Q This document is not written in both languages, is it?

A No, it is not.

Q It's entirely in English?

A That is correct.

MR. FLAMHAFT: I have no further questions, your Honor.

THE COURT: It will be received.

THE CLERK : Government's Exhibit 2 previously

marked for identification now received in evidence.

MS. SCHWARTZ: May I read this into the record?

"I Ralph Mariani have been advised of my rights and I understand my rights. I voluntarily permit the FBI to search my automobile. No threats or promises have been made to me to grant this permission."

Did you personally see Mr. Mariani sign this Exhibit 2?

THE WITNESS: Yes, I did.

DIRECT EXAMINATION

CONTINUED BY MS. SCHWARTZ:

Q How long did it take from the time you first asked him for permission until he signed the written consent?

A Approximately three to five minutes.

Q And how many times did you ask him for permission before he agreed to consent to the search?

A Once.

Q Was anybody else questioning Mr. Mariani during the time that you were asking him for this permission?

A There was a New York City Police detective sitting next to me, but I was conducting the questioning.

Q Your testimony then is only you were questioning him or were talking to him during the time you were asking him for permission?

1
2 A Correct.

3 Q Did there come a time during your conversation
4 with Mr. Mariani that he mentioned his intention concerning turn-
5 ing himself in?

6 MR. FLAMHAFT: Objection, not relevant to this
7 hearing.

8 MS. SCHWARTZ: May I be heard? I think his state
9 of mind in this is relevant to his ^{predisposition} previous position to
10 given consent. I think his state of mind is important
11 to determine whether or not it was freely and voluntarily
12 given.

13 The testimony that Agent Garcia will present will
14 show the predisposition to cooperate.

15 MR. FLAMHAFT: I think that would be after the
16 fact. If the defendant feels he has no choice then his
17 predisposition may be to turn himself in to the polic.

18 MS. SCHWARTZ: This is evidence relavent to his
19 state of mind before the arrest.

20 THE COURT: I think I'll ~~take~~ it on that score. It
21 might or might not show depending what the facts are,
22 whether he had already formed an intent or he was in
23 the process of forming an attempt to cooperate. I don't
24 know what it will show. I don't remember during the
25 trial. It was something along this line during the trial.

1
2 MR. FLAMHAFT: There was some indication that
3 my client had made preparations to turn himself in.

4 MS. SCHWARTZ: The defendant himself testified
5 about calling the FBI.

6 If I may proceed.

7 Do you recall a discussion in which this subject
8 came up?

9 A I recall a discussion, I don't have a clear recol-
10 lection of the details.

11 Q Do you recall testifying in the trial of U.S.A.
12 versus Ralph Mariani on October 21, 1975?

13 A Yes, I do.

14 Q Do you remember testifying at that time about
15 the subject of Mr. Mariani's desire to turn himself in?

16 A Yes, I do.

17 Q If I turn to the transcript of that hearing,
18 would it refresh your recollection as to your testimony and
19 as to the facts of this case?

20 A It may.

21 Q I direct your attention to pages 300 through 303.

22 A (witness looking through pages 300 through 303)
23 I have read the transcript.

24 Q Do you now have an independent recollection of
25 Mr. Mariani's statement to you on August 25, 1975 about wanting

1
2 to turn himself in before he was arrested?

3 A No, I do not.

4 Is the testimony as you have read it an accurate
5 reflection of what you recall testifying to?

6 A Yes, it is.

7 MS. SCHWARTZ: Your Honor, I would ask that the
8 prior testimony be admitted as prior recollection.

9 MR. FLAMHAFT: I have no objection.

10 THE COURT: Pages 300 through 303?

11 MS. SCHWARTZ: Yes.

12 THE COURT: They are part of the record, but
13 we'll mark them in evidence; page 300 through 303 of
14 the trial, cross-examination of Mr. Flamhaft of this
15 witness deemed marked Government's Exhibit 3.

16 THE CLERK: Government's Exhibit 3 so marked in
17 evidence.

18 BY MS. SCHWARTZ:

19 Q Did there come a time after Mr. Mariani gave you
20 permission, the written permission to search his car, that he
21 gave you the keys to his car?

22 A Yes, he did.

23 Q And did you then turn them over to another agent
24 to be used in searching the car?

25 A Yes, I did.

1
2 Q You also lated questioned Mr. Mariani concerning
3 his background?

4 A Yes, I did.

5 Q And then you had conversations with him, you
6 learned his age?

7 A Yes, I did.

8 Q Do you recall what it was?

9 A No, I do not.

10 Q Did you ask him about his education?

11 A Yes, I did.

12 Q Do you recall what he told you?

13 A He indicated that he had 11 years of education in
14 Brooklyn and in New York.

15 Q And did he indicate whether or not he could read
16 and write English?

17 A He indicated he could read and write English.

18 Q Did you ask him about his prior arrests?

19 A Yes, I did.

20 Q Do you recall as to what he told you?

21 A He advised me that he had a prior arrest. I
22 don't recall how many he had indicated he had.

23 (Continued next page)
24
25

Q Did you make a 302 or a report of what Mr. Mariani told you about his background?

A Yes, I did.

Q When did you make the report?

MR. FLAMHAFT: Your Honor, I must object. I don't understand going into the defendant's background.

THE COURT: I assume she wants it for the age.

MS. SCHWARTZ: I want his age and I want to show that he was not a new comer to the law, and I think that's a relevant fact to determine whether or not it's voluntary consent.

MR. FLAMHAFT: The fact that he had been arrested before.

MS. SCHWARTZ: Yes.

THE COURT: What she wants to show is that this is not his first arrest, so it would have some bearing on his voluntariness. I don't know how much, but it would have some. He was 29 years old.

MR. FLAMHAFT: We don't dispute that, Your Honor.

DIRECT EXAMINATION (CONTINUING)

BY MS. SCHWARTZ:

Q Did you make a report of your questioning of Mr. Mariani concerning his arrest, prior arrest?

A Yes, I did.

MS. SCHWARTZ: May I have this marked?

THE CLERK: So marked Government's Exhibit 4.

MR. FLAMHAFT: The defendant freely gave his background to the Jury.

DIRECT EXAMINATION (CONTINUING)

BY MS. SCHWARTZ:

Q I show you Government's Exhibit 4 for identification, it's a 302 report, dated 8/26/75, and ask you to look at it to see if it refreshes your recollection about Mr. Mariani's statement at the time concerning his arrest record.

MR. FLAMHAFT: Maybe we could save some time. We'll concede defendant Mariani has a criminal background.

MS. SCHWARTZ: I would like to bring out the number of arrests.

THE COURT: He has a number of convictions.

MR. FLAMHAFT: Whatever is there we'll agree to.

MS. SCHWARTZ: It says eleven arrests.

THE COURT: Can I take note of what is on pages

--

MR. FLAMHAFT: Yes, my direct examination during the trial.

MS. SCHWARTZ: I have no further questions.

CROSS EXAMINATION

BY MR. FLAMHAFT:

Q Agent Garcia, Agent Cronin called you because you spoke Spanish; is that correct?

A Not entirely for that specific reason. We had staked out at different locations. He wanted everybody advised that he had effected the arrest. He called me -- Yes, because I do speak Spanish. He wanted me to come, to be of assistance at the apartment.

Q Because as a matter of fact you told the Government that he had already been arrested?

A That's right.

Q How much time was there between the time that Agent Cronin told you that he had effected the arrest and the time that you arrived; do you know?

A I would be guessing. I would say approximately five minutes.

Q You don't know whether or not Agent Cronin spoke to him during that time?

A Well, I would have to say that we had to tell him that he was under arrest. I asked him if he had advised him of his rights. Cronin advised me that he had advised him of his rights.

Q So Agent Cronin had spoken to Mariani in English?

A That is correct.

1
2 Q And he told you that?

3 A That's correct.

4 Q Of course, we don't know whether Agent Cronin
5 tried to get the keys from the car from him before you
6 arrived?

7 A I do not know.

8 Q You don't know?

9 A I do not know.

10 Q And you have a very soft sweet way about you,
11 you make a very nice appearance and you speak softly, and you
12 speak Spanish. Do you think that's why Agent Cronin called
13 you?

MS. Schwartz: Objection

14 A Agent Cronin speaks softer than I do.

15 MS. SCHWARTZ: I'll ^{with draw the} register an objection.

16 Q (Mr. Flamhaft continuing) Do you recall what
17 the state of address of Mr. Mariani was when you spoke to him?

18 A He was dressed when I spoke to him.

19 Q Was he in the living room?

20 A Yes, he was.

21 Q Wasn't he naked?

22 A No sir; not when I arrived.

23 Q Was he fully clothed, pants, shoes, shirt on?

24 A To the best of my recollection, he was fully
25 dressed.

1
2 Q Do you recall whether or not, and I don't mean
3 to be petty, if he was dripping wet from a shower the time
4 that you arrived?

5 A I do not recall. I remember Agent Cronin tell-
6 ing me later that he had arrested him in the shower.

7 Q When you got there, is it correct, or is it not
8 correct, that he was handcuffed to a chair with four police
9 officers around him; if you remember?

10 A I don't remember. No, he was not handcuffed
11 when he signed the permission to search his car. I don't
12 remember him having any handcuffs on. I'm not 100% sure of
13 that.

14 Q Were there guns out of holsters in that apart-
15 ment by any of the law enforcement officials?

16 A No. I would be guessing, but I think there was
17 a detective with a shot gun, but the hand guns were all
18 holstered.

19 Q Was that shot gun near Mr. Mariani when he was
20 arrested? Was it exposed?

21 A It was exposed but not near him. When I spoke
22 to Mr. Mariani Detective Acosta of the New York City Police
23 Department and I were seated in the living room. The other
24 people were not in the immediate area, that is Agent Cronin;
25 Detective Palmer who was the detective with the shot gun, and

2 Sergeant Gilmartin.

3 Q Were you present when any of the law enforcement
4 officials stated in effect to Mr. Mariani that he had better
5 give permission because we don't want to involve your wife?

6 A No.

7 MS. SCHWARTZ: Objection to the form.

8 THE COURT: You know the rule, if it comes from
9 the witness stand.

10 MR. FLAMHAFT: Can I proceed with the question?

11 Were you present?

12 A I forgot what the question was.

13 Q Were you present when one law enforcement
14 official said to Mr. Mariani "You had better give us the keys
15 or else we'll involve your wife in this"

16 A No statement like that was made in my presence.

17 Q How long were you with Mr. Mariani from the
18 time you arrived until the time that you left?

19 A I would say approximately fifteen or twenty
20 minutes, and when we left I was in a car that took him to the
21 New York City office of the FBI.

22 Q And you would have heard those words if they
23 were mentioned?

24 A Yes.

25 Q Of course, that leaves any time before you

2 arrived that there was conversation between law enforcement
3 officials and Mr. Mariani?

4 A That is correct.

5 Q Were you present when one or more law enforce-
6 ment officials inquired of Mr. Mariani whether or not he owned
7 an automobile?

8 A I do not recall any questioning as to whether he
9 owned an automobile. When I indicated to him that we wanted
10 to search his car, we all knew that he owned a car. There
11 was never in my presence any question about whether he owned
12 a car or not that I can recall.

13 Q What were the words that you used to Mr.
14 Mariani stating to him that he had the right to refuse law
15 enforcement officials at that time to search his car, or in
16 other words, how did you explain that legal right to him?

17 A I told him he had a legal right to refuse per-
18 mission to have his car searched.

19 Q Did he say that he understood that?

20 A He indicated that he understood what I was tell-
21 ing him.

22 Q And that he chose not to exercise any rights?

23 A He did not say that he did not chose to exercise
24 that right; he indicated at that point, or he advised me at
25 that point what we were going to find in the search.

Q How did he appear to you? What I mean by that, if you don't understand the question, did he appear calm to you? Or did he appear nervous to you?

A He did not appear nervous, and he seemed to be in control of the situation, that is, he seemed to have a lot of confidence in himself.

Q Did he reveal that to you that night?

A That's the impression I received.

Q So then he wasn't nervous?

A Did not appear to be nervous.

Q He wasn't overwrought by the police officers in his house?

A No, he was not.

Q Did he ask to see any member of his family?

A He asked later in the evening if we could grant him permission to make a phone call. I believe he wanted to call his wife, and we gave him permission; he did make a call.

Q That was after?

A Afterwards.

Q Are there written consent forms used by the FBI for the purpose of advising a defendant of their rights?

A Yes, there are.

Q That's pursuant to any statement that they would

make?

A That is correct.

Q Involving themselves in the commission of a crime?

A That is correct.

Q Are there such forms for other types of permission?

A Yes.

Q Are there forms for permission to sign for a car search?

A Yes, it is.

Q Is it your testimony that you do not have that form with you that night?

A That's correct.

Q That's the reason you used this scrap of paper?

A That is correct.

Q Because you were on the scene and it would expedite things?

A That is correct.

Q You never made any attempt to get that form at that time, did you?

A That is correct.

Q Was it available to you that night?

A In the office of the New York

1 Q In New York?

2 A In the New York Office.

3 Q And you went there that night?

4 A Yes, we did.

5 Q So it was possible for you to go to New York
6 and get him to sign it there and then go back?

7 A That is correct.

8 Q But you chose to do it the other way?

9 A That is correct.

10 Q And I think it's agreed that you were the one
11 who wrote out the form?

12 A Yes, I did.

13 Q And I think you indicated that it was three
14 or five minutes that Mr. Mariani looked at the piece of
15 paper and then signed; am I correct, you mentioned three or
16 five minutes?

17 A From the time I asked him if he would grant
18 us permission to search the car, and the time we wrote out
19 the form and executed same -- Not form, the piece of paper.

20 Q So he had said, "Yes", and then you began to
21 write?

22 A That is correct.

23 Q Or was it that you had written and it took him
24 three to five minutes to decide whether to sign that?

1
2 A No. I asked him would he give us permission,
3 he said he would. I told him that we would have to have
4 written permission, and he said he was agreeable to that.
5 I sat down and wrote it out, I read it to him and he signed
6 it.

7 C That didn't take you three to five minutes to
8 write that piece of paper?

9 A Pardon me?

10 Q Was that the total?

11 A I would say so.

12 Q And he signed it immediately?

13 A Yes.

14 Q No hesitation?

15 A None.

16 MR. FLAMHAFT: All right, thank you.

17 MS. SCHWARTZ: I have no redirect.

18 THE COURT: You may step down.

19 MS. SCHWARTZ: The Government doesn't plan to
20 call any further witness. We'll rest on his testimony.

21 MR. FLAMHAFT: The defendant with permission
22 of the Court request that Mr. Mariani take the stand.

23 (Continued on next page.)
24
25

1 R A L P H M A R I A N I, having been duly sworn, was
2 examined and testified as follows:

3 DIRECT EXAMINATION

4 BY MR. FLAMHAFT:

5 Q Mr. Mariani, do you know why you are in Court
6 today?

7 A Yes, sir.

8 Q And we had a conference about an hour ago, and
9 I advised you why you are in Court; remember that?

10 A Yes, sir.

11 Q In your apartment on the night that you were
12 arrested, will you tell the Judge, please, the circumstances
13 leading up to your arrest as best you can remember as to
14 what happened in your apartment?

15 A Well, I called my wife, she said that there was
16 agents in my house they were looking for me; so she said they
17 left. When I went over there to my house, I called Mr.
18 Cronin, I told him I was going to turn myself in. So after
19 I did that, I was little dirty, I figured I would take a
20 shower, I jumped in the shower. I was there maybe, not even
21 a minute, put the soap on, all of a sudden the door bust
22 open, two agents came out with guns. They went in the bath-
23 room, they told me to get out. I said, "Please, let me get
24 the soap off of me, please" they said, "Get out of there".
They pulled me out nude and they handcuffed me, my hands

1
2 behind my back and they took me to the living room. I had
3 all the soap, water dripping. I said, "Let me get my clothes"
4 they said, "You stay where you are". Then they started walk-
5 ing all over the house, then three more came in, then I sat
6 down. They sat me down, then they decided to take the hand-
7 cuffs off. One of them said "Is this what you were wearing?"
8 I said, "Yes". So he gave me the clothes, so I got dressed,
9 just my pants. I didn't have my shirt on. Then I don't
10 remember which one sat next to me and gave me a piece of
11 paper, and he advised me of my rights. He said "This is
12 your right, sign here".

13 Q Do you know what rights he was talking about
14 at that time?

15 A He said I was under arrest; that piece of
16 paper it was to prove that he advised me of my rights.

17 Q Was that for any statement that you wanted to
18 make about the crime? Do you understand what I mean?

19 A No.

20 Q Two times during that evening you were asked
21 to sign a piece of paper?

22 A Right.

23 Q The first one was about any statement that
24 you wanted to give about the crime; am I correct?

25 A Right.

Q And the second one was when this gentleman asked you to sign another piece of paper; is that correct?

A Right.

Q Now, when you signed the first statement, did you understand what you were signing?

A No. I was scared. All I was looking at was this officer with a gun in his hand.

Q Which officer was that?

A I don't remember. It was four of them. They had guns pointed down, I was shook up, scared.

Q Well, you had been arrested eleven times before. Why were you scared?

A Not like this, not with guns; walking down the avenue, they bust me, my friend had a needle, so they take us in; that's what I get arrested for.

Q Are you telling us that this was the first time that you were ever in a situation like this upon your arrest?

A Yes.

Q And it's different from your other arrests?

A Right. The door didn't open up the way it opened up was like a bomb, and two guys with a gun, I figured I was going to get killed.

Q Is this the first time you were arrested in your apartment under these circumstances?

1

2

A Right.

3

Q Now, when you first saw this first piece of

4

paper, did you read it?

5

A No, I didn't read it.

6

Q You signed it?

7

A Yes, I signed it.

8

Q Anybody physically beat you to sign it?

9

A No.

10

Q Why did you sign it?

11

A They said something about my wife getting

12

involved. I don't know what else. I don't know what else

13

followed that. When I looked up I saw two FBI agents looking

14

in the drawers, in the closets, then another one to the left

15

said, "By the way, do you own a car".

16

Q When you had this conversation about a car,

17

was that gentleman who just testified in your apartment?

18

A No, he wasn't there. He came after I gave them

19

the keys and everything -- to one of the FBI. He came on

20

after.

21

Q Did any of those law enforcement officials

22

say anything to you about what would happen to you if you

23

did not give them permission to get the car?

24

A No sir.

25

Q They did not? Do you understand my question

clearly?

A No.

Q Did any of the law enforcement officials that were there that night in your apartment, did they say anything to you, what would happen to you? What would happen to your wife if you didn't give them the keys to the car?

A No.

Q Was there a threat made concerning your wife?

A Yes.

Q That's what I'm asking you.

A I don't recall what followed that. All I heard my wife getting involved. I'm looking at the guy with the gun, I got scared and I gave him the keys.

Q Did they mention something about your wife and then you gave them the keys to the car?

A Right.

MC. SCHWARTZ: Objection. I've been very patient, but I think ^{there's} it's a limit ^{to} how long Mr. Flamhaft should be allowed to testify.

Q Tell us why did you give them the keys to the car?

A First of all I didn't want my wife to get involved. I just figured I had no car, you know.

THE COURT: You didn't have a car?

1
2 THE WITNESS: I had a car, but I had nothing
3 to hide in my car. They said, "Can I get the keys"
4 so I gave them the keys.

5 Q Did any of the agents tell you that you had
6 the right not to give them the keys to the car?

7 A Never.

8 Q That's including the gentleman who was just on
9 the witness stand?

10 A Including him.

11 Q You are sure?

12 A Right.

13 Q Would you remember that if it was said to you?

14 A What?

15 Q Withdrawn.

16 The piece of paper that you signed -- you
17 signed another piece of paper that night?

18 A Right.

19 Q Did you see the piece of paper that I looked
20 at when I was sitting there?

21 A Right.

22 Q That's your signature?

23 A The small one or big one?

24 Q the small one.

25 A Yes.

1
2 Q That's your signature?

3 A Yes.

4 Q Why did you sign that?

5 A I was scared, I just signed it.

6 Q Did you read it before you signed it?

7 A I didn't read -- That's just to prove that
8 they advised me of my rights.

9 Q Why did you sign it if you didn't understand
10 it?

11 A He told me that's just proof that they advised
12 me of my rights, so I signed it. I didn't read it.

13 Q Did the officer tell you to read it first
14 before you signed it?

15 A No sir.

16 Q Is it your testimony that you did not know
17 what you were signing?

18 A Right, sir.

19 THE COURT: Both copies?

20 THE WITNESS: They said they advised me of my
21 rights.

22 THE COURT: Both copies were to advise you of
23 your rights?

24 A Yes.

25 Carcia said this is just for my rights.

1
2 THE COURT: They had you sign the rights form
3 twice?

4 THE WITNESS: Yes.

5 THE COURT: That's what you thought?

6 THE WITNESS: Yes.

7 THE COURT: Were they identical in shape?

8 THE WITNESS: One was big and one was small.

9 I just kept looking at the other guys, the gun.

10 Q Was your curiosity aroused that one was big
11 and one was small?

12 A All I was thinking, "Oh gee, my wife".

13 Q Maybe the little one was smaller would take
14 you less time to read it, did that cross your mind?

15 A No.

16 Q You didn't read either one?

17 A No. I went to school, that was my worst
18 subject; math I'm good; reading, I hate to read.

19 MR. FLAMHAFT: Thank you.

20 CROSS EXAMINATION

21 BY MS. SCHWARTZ:

22 Q Mr. Mariani, how old were you on August 25,
23 1975?

24 A I was 30 -- I was going to be 30. I was 29.

25 Q And is it true that you have had eleven years

1
2 of schooling?

3 A Yes.

4 Q And that schooling has been in New York or
5 Brooklyn?

6 A Yes.

7 Q Is it true you have been arrested about eleven
8 times before this arrest?

9 A Yes sir.

10 Q How many times have you appeared in Court?

11 A I don't know. I don't recall.

12 Q How many times were you given your Miranda
13 Warnings or your Constitutional Rights?

14 A I imagine every time I get arrested.

15 THE COURT: Every time you go to Court?

16 THE WITNESS: Every time I get arrested.

17 THE COURT: Every time you go to Court?

18 THE WITNESS: Go to Court; no.

19 THE COURT: Judges don't give you your rights?

20 THE WITNESS: I don't recall.

21 THE COURT: Did I ever give you your rights?

22 THE WITNESS: I don't remember. I don't know
23 too much about law.

24 THE COURT: Do you know what your rights are?

25 THE WITNESS: When I know I have to have an

attorney present.

THE COURT: You know you don't have to answer any questions.

THE WITNESS: And that one; yes.

THE COURT: You know anything you say may be used against you?

THE WITNESS: Right.

THE COURT: You know that.

THE WITNESS: That's right.

THE COURT: You know that?

THE WITNESS: Yes.

THE COURT: You nod your head he doesn't get it. Yes?

THE WITNESS: Yes.

CROSS EXAMINATION (CONTINUING)

BY MR. SCHWARTZ:

Q How many times have you been appointed an attorney or retained a lawyer to represent you in criminal cases before the trial in this case?

A Legal Aid, as many times as I got arrested.

Q Did you discuss your cases with the lawyers who were representing you during those eleven cases?

A Yes.

Q During any of those eleven times, did any of

1
2 them tell you that you didn't ever have to make a statement
3 to the officer or agent?

4 A I don't recall.

5 Q Any times you were arrested you didn't have to
6 say anything?

7 A I don't recall.

8 Q I show you Government's Exhibit 2 in evidence
9 and ask if this is indeed your signature?

10 A Yes.

11 Q But your testimony is that this signature that
12 this document Exhibit 2 in evidence, you signed it, but you
13 don't remember signing it, or you thought it was just your
14 rights; is that correct, you're not familiar with the
15 contents?

16 A I remember signing it. All I had in my mind
17 was the guy with the gun, my wife, what a mess I got into.

18 Q How many times did you sign a paper on August
19 25th, any paper? How many times did you sign your name to
20 a document?

21 A Twice.

22 Q And both times it was just a form saying that
23 you had been advised of your rights?

24 A Yes.

25 Q Do you recall signing a statement about your

1
2 involvement in the bank robbery?

3 A Say that again?

4 Q Did you sign a statement that night in which
5 you explained what you were doing that day?

6 A No. Which one?

7 Q You didn't sign a statement about what you had
8 done on August 25 with Felix Acevedo?

9 A In Headquarters, a big piece of paper. This
10 was last year.

11 Q You don't recall whether you signed something
12 or not?

13 A If you bring me the paper.

14 Q I show you Government's Exhibit 4 for identifi-
15 cation and ask if this refreshes your recollection as to
16 whether or not you signed this?

17 THE COURT: Do you want him to look at the
18 top sheet or the entire document?

19 MC. SCHWARTZ: As much as he needs to refresh
20 his recollection.

21 I'm asking you if you remember signing
22 a statement to that effect?

23 A Yes.

24 Q Did you read that before you signed it?

25 A No.

1
2 Q But it is your testimony, is it not, that you
3 had intended to turn yourself in after you took a shower?

4 A After my wife told me that they were looking
5 for me.

6 (Continued on next page.)
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Mariani - Cross

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Q What time did she tell you that?

A Oh, I don't know. I don't remember the time, I was late.

Q Well, was it just a few minutes before you made the phone call, or was it a long time before.

A What?

Q When did she tell you? Did she tell you a few minutes before you called the FBI? I'm trying to find out when it was, how long before you made the phone call to the FBI headquarters that you called them to tell them you were turning yourself in?

A I don't know the time. I would be guessing.

Q What time did you make the phone call to the FBI to tell them that you were turning yourself in?

A About 11:00, something to 11.

Q Do you know the name of the agent who allegedly said he was going to get your wife involved if you didn't give him your keys?

A No.

Q Do you remember what he looked like?

A I know he was tall.

Q You don't remember anything else either than he was tall?

A All I kept looking at was the gun.

Mariani - Cross

MS. SCHWARTZ: I have no further questions.

THE COURT: Mr. Mariani -- no, never mind.

Any other questions?

MR. FLAMHAFT: No sir.

THE COURT: All right, you may step down.

MR. FLAMHAFT: It's the Government's burden.

THE COURT: We could have Ms. Schwartz go first and you next and she can rebut if she likes, which I guess is summation.

MR. FLAMHAFT: Okay.

MS. SCHWARTZ: Your Honor, viewing the testimony so as to judge the totality of the circumstances surrounding the granting of written permission, the testimony shows that Agent Garcia arrived within a few minutes after the defendant had been placed under arrest, and that his rights had been given to him twice before he was ever asked for permission. He was informed of the fact that he could refuse to give permission. That's a very significant factor. There have been cases which have been upheld involving permission and valid consent where the defendant wasn't even advised of his rights to refuse. There were no threats or promises, in fact the paper ^{which} was signed by Mr. Mariani and which really speaks for itself, says that no threats or promises had

1 been made to him.

41

2 He was 29 years of age at the time, he had some
3 education in this country. He certainly, from what
4 Mr. Garcia said, he was a confident young man. He was
5 not a newcomer to the law, he knew most likely from
6 his made conditions what he had to do and what he
7 didn't have to do. To suggest that under these circum-
8 stances that he was not aware of the fact that he could
9 refuse consent is ridiculous. There is no allegation
10 that he's patently decisioned. He's not a weak person
11 that his will could have been overbourne by any acts
12 of the agents. The consent, he was only asked once for
13 permission, he readily gave his consent and it was given
14 within minutes of his being detained. There is no alle-
15 gation of deprivation or prolonged questioning. In fact
16 there was only one agent who even asked him for his per-
17 mission at the time. This is not a case where he might
18 have been badgered into submission.

19 The testimony shows that he was asked and he
20 very freely and willfully consented. In fact, he just
21 testified that he intended to turn himself in, I think
22 he was predisposed to give his consent. He wanted to
23 appear to be cooperating in all respects. I think that
24 admission on his part undercuts any allegation that he
25 was coerced into giving permission.

1 MR. FLAMHAFT: Your Honor, I'm just going to ask
2 the Court to take a very pragmatic view of Mr. Mariani
3 and the circumstances of that night in his apartment,
4 and ask the Court to consider whether or not the Govern-
5 ment has met its burden that it must in this hearing, and
6 I wonder what kind of impression Mr. Mariani made on you
7 today when he testified as to his subjective state of
8 mind at that time. Whether or not he appeared to you
9 today, or could have possibly have appeared on that
10 night, under completely different circumstances a "con-
11 fident man." That was the word that the agent used,
12 gave the impression that Mr. Mariani knew exactly what
13 was going on. He knew exactly what his rights were.
14 He knew what he could not do, he knew what he could do.
15 I wonder if that kind of impression Mr. Mariani made on
16 you today. He was consistent to the point even back
17 in FBI Headquarters when he asked about the third state-
18 ment, and he was consistent at that time saying he didn't
19 even remember what he signed at that time. I don't think
20 it's that far fetched that Mr. Mariani was so frightened
21 and so submitted to the authorities that he just may
22 have given these keys not as a voluntary and free act,
23 and that he was, rather impliedly coerced by some threats
24 by the police officers by the circumstances. The defen-
25 dant being dragged out of the shower, sitting in a room,

1 there is some conflicting testimony as to his state of
2 dress. Apparently there is no conflict whether a gun
3 was in or about the area. I wonder whether or not
4 Mr. Mariani is the type of person, as he appeared before
5 you today, who would knowingly and intelligently waive
6 a right. Thank you for hearing me, your Honor.

7 THE COURT: Do you want to say anything else,
8 Ms. Schwartz?

9 MS. SCHWARTZ: Mr. Flamhaft pointed out he signed
10 a confession, he didn't know what he was signing. He
11 did testify at trial that consistently with what he
12 signed or what confession he made, he even stated at that
13 time that it was a fair and accurate representation of
14 what he had said, and I think that his statement that
15 he just signed the things without looking at them is
16 just a convenient excuse. There is nothing more than a
17 bald allegation that he was threatened. He doesn't even
18 remember the description of the person. If someone was
19 threatening his life he would have a lasting impression
20 of the person's identify.

21 MR. FLAMHAFT: I wonder if that last statement
22 is pragmatic, if that happens in that happens in the
23 lives of human beings; someone would remember one of
24 four policemen standing around him threatening something
25 about his wife. I wonder if that's really practical

1 analysis of something that would happen.

2 MS. SCHWARTZ: At no time during the trial did
3 Mr. Mariani when he had the opportunity to testify about
4 the circumstances of his arrest, he did not mention,
5 I believe the record will show, again that his wife was
6 threatened or who did it or the circumstances of it.

7 MR. FLANHAFT: There was no hearing during the
8 trial on this question.

9 MS. SCHWARTZ: But on direct examination he didn't
10 mention it either.

11 THE COURT: Well, I have listened to the witnesses,
12 and, of course, Mr. Flanhart you're confronted with two,
13 which the Court cannot close its eyes to a document which
14 a party has signed, particularly a document that is so
15 short in scope and content and significant as far as a
16 case of this kind. The thought that it might constitute
17 another signature on a rights form doesn't carry much
18 weight with me. I was looking at the trial record where
19 he admitted on cross-examination, quite somewhat differ-
20 ently as he has now testified here today, he had doubts
21 about what his rights were, even though he's been arrested
22 11 times, and presumably appeared 11 times prior to this
23 in various courts, and has appeared before me, and I'm
24 reasonably certain in every case I do give him his
25 rights. That's quite a number of times to have had your

1 rights read to you. When he was asked by Ms. Schwartz
2 about his rights on cross-examination he admitted to
3 each one of them as they were given. I find it very
4 hard to credit his testimony that he thought that this
5 was a right form, a document this small and written
6 out in an agent's handwritting in the fashion that this
7 was.

8 I also find it very hard to credit a person who's
9 arrested 11 times before and convicted several times
10 before, as this person was, that he didn't take the
11 trouble -- if he didn't read it, at least inquire with
12 some counsel what he was signing which, of course,
13 your client says he didn't, so I don't think he leaves
14 me much alternative to credit Agent Garcia's testimony
15 for some much of the period after he arrived. Agent
16 Garcia is pretty definite about what he said to him
17 with respect to obtaining permission to search his car
18 and with advice, he didn't have to give permission, and
19 him seeming ready to be cooperative at the time, he
20 signed the permission. Nobody, at least in Agent Garcia's
21 presence, made any threat to his wife. Agent Garcia
22 said your client gave the keys to him and he gave it
23 to another agent and someone else made the search.

24 Under the circumstances, I think the proof is
25 overwhelming, if not conclusive, the surrender of the keys

1 and the volunteering what was in the car was all volun-
2 tary, did not in any way transgress his rights.

3 MS. SCHWARTZ: May I say one further thing, which
4 I left out of my argument?

5 At page 40 of one of the transcripts, Mr Mariani
6 testified during the trial that he did tell the agents
7 that they would find a gun in his car, he also testified
8 that --

9 MR. FLAMHAFT: Again, the question is now part
10 of the hearing be that as it may, I except your Honor's
11 decision.

12 THE COURT: That is my finding. Those are my
13 findings.

14 MR. FLAMHAFT: I don't know what happens with
15 the case now.

16 THE COURT: Off the record.

17 (Off of the record a discussion was had.)

18 (Whereupon the Court stood in recess in this
19 matter.)
20
21
22
23
24
25

STATE OF NEW YORK, COUNTY OF KINGS

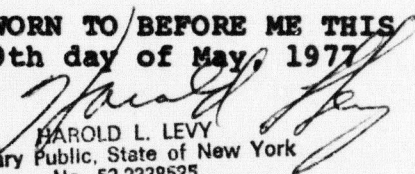
KRIS WOLBRUM, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, resides at 824 E.9th St., Brooklyn, New York 11230.

On May 9, 1977, deponent served the within Appendix to Appellant's Brief upon Assistant U.S. Attorney Cheryl Schwartz, at 225 Cadman Plaza East, Brooklyn New York 11201, the attorney for the Plaintiff-Appellee, the address designated by said attorney for that purpose by depositing a true copy of same enclosed in a post-paid envelope in a post office or official depository under the exclusive care and custody of the United States Postal Service within the State of New York



KRIS WOLBRUM

**SWORN TO BEFORE ME THIS
9th day of May, 1977**



**HAROLD L. LEVY
Notary Public, State of New York
No. 52-2338525
Qualified in Suffolk County
Commission Expires March 30, 1979**